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45736 7590 09/02/2009 Christopher M. Goff (27839) ARMSTRONG TEASDALE LLP ONE METROPOLITAN SQUARE SUITE 2600 ST. LOUIS, MO 63102			EXAMINER HAND, MELANIE JO	
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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* DAVID ARTHUR KUEN,  
KRISTI JO BRYANT, MARK STEVEN FRANKE,  
CYNTHIA HELEN HENDREN, RICHARD JOSEPH KAMPS,  
LISA NICKEL, KATHERINE CAROL WHEELER, and  
YEE YANG

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Appeal 2009-002708<sup>1,2</sup>  
Application 10/736,069  
Technology Center 3700

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Decided: August 31, 2009

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Before DONALD E. ADAMS, ERIC GRIMES, and  
FRANCISCO C. PRATS, *Administrative Patent Judges*.

PRATS, *Administrative Patent Judge*.

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<sup>1</sup> The real party in interest is Kimberly-Clark Worldwide, Inc.

<sup>2</sup> This appeal is related to Appeal No. 2008-4589 (App. Ser. No. 10/735,978)  
(App. Br. 1).

## DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to an absorbent garment. The Examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

## STATEMENT OF THE CASE

The Specification discloses an absorbent garment that resembles conventional clothing “such as shorts (e.g., boxer shorts, gym shorts, running shorts, etc.), skirts, skorts (i.e., a combination of a skirt and a pair of shorts), swim trunks and the like, while providing the functions of conventional absorbent articles, such as taking in and retaining body exudates released by the wearer” (Spec. [0039]). The absorbent garment includes an inner absorbent assembly attached to a waist belt which is in turn attached to an outer garment shell (*see id.* at [0005]-[0006]).

Appellants’ Figure 8, reproduced below, shows one embodiment of the garment:

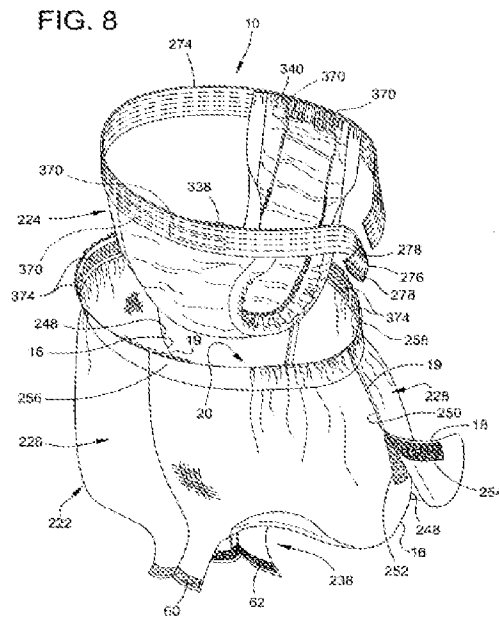


Figure 8 shows the absorbent assembly 224 “releasably attached to an inner surface of the waist belt 274 by fastening components 370 attached to the outer surface of front and back waist ends 338, 340 of the absorbent assembly so that [the] absorbent assembly is generally disposed between the waist belt and the wearer” (Spec. [00101]).

Figure 8 also shows garment shell 222 “releasably attached to the outer surface of the waist belt 274, such as by fastening components 374 attached to the inner surface of the garment shell generally at the front and back waist ends 256, 258 thereof” (*id.* at [00103]). The Specification discloses that “the fastening components 374 of the illustrated embodiment comprise hook fasteners and the waist belt 274 material provides a suitable loop material for releasable attachment to the hook fastener” (*id.*).

Claims 1, 3-36, and 38-41 are pending and on appeal (App. Br. 2).  
Claims 1 and 36, the independent claims, read as follows:

1. An absorbent garment for personal wear about the wearer’s waist, said absorbent garment comprising:
  - an absorbent assembly constructed to take in and retain body exudates released by the wearer, the absorbent assembly having an inner surface adapted for contiguous relationship with the wearer’s body, an outer surface, a front waist region, a back waist region, a crotch region extending longitudinally between and interconnecting the front waist region and the back waist region, a front waist end and a back waist end;
  - a garment shell configured for encircling the wearer’s waist, said garment shell having a front waist region, a front waist end at said front waist region, a back waist region, and a back waist end at said back waist region, the absorbent assembly being disposed generally within the garment shell,
  - and
  - a waist belt configured for wear about the wearer’s

waist, the absorbent assembly being releasably and refastenably attached generally at the front and back waist regions thereof to the waist belt, the garment shell being releasably and refastenably attached generally at the front and back waist regions of said garment shell to the waist belt whereby the front waist region of the garment shell is in opposed relationship with the front waist region of the absorbent assembly and the back waist region of the garment shell is in opposed relationship with the back waist region of the absorbent assembly.

36. A method for placing an absorbent garment on a wearer's waist, said method comprising:

extending a waist belt about the wearer's waist such that an overlapping end portion of the belt overlaps an underlying portion of the belt;

releasably attaching the overlapping end portion of the belt to the underlying portion of said belt to secure the belt on the wearer's waist;

releasably and refastenably attaching an absorbent assembly to said waist belt, the absorbent assembly being constructed to take in and retain body exudates released by the wearer, the absorbent assembly having an outer surface and an inner surface adapted for contiguous relationship with the wearer's body, said absorbent assembly further having a front waist region, a back waist region, a crotch region extending longitudinally between and interconnecting the front waist region and the back waist region, a front waist end at said front waist region and a back waist end at said back waist region; and

releasably and refastenably attaching a garment shell to the waist belt, the absorbent assembly being configured for being disposed within the garment shell, said garment shell having a front waist region adapted for generally opposed relationship with the front waist region of the absorbent assembly and a back waist region adapted for generally opposed relationship with the back waist region of the absorbent assembly.

The Examiner cites the following documents as evidence of unpatentability:

New	US H1440	May 2, 1995
Rosch	US 6,115,847	Sep. 12, 2000
Christoffel	US 2002/0087137 A1	Jul. 4, 2002

Claims 1, 3-36, and 38-41 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Rosch, Christoffel, and New (Ans. 3-8).

### OBVIOUSNESS

#### *ISSUE*

The Examiner cites Rosch as disclosing “an active wear trunk garment 110 having a liquid-permeable trunk cover 114 . . . [with] waste containment structure 142” (Ans. 3). The Examiner finds that “[w]aist elastics 143, 145 (collectively, waist belt) are an integral portion of cover 114 in the waist regions 131 and 133 and that garment 110 is joined to said structures” (*id.*). The Examiner further finds that Rosch’s “trunk cover 114 is joined to elastic members 143, 145 at the waist regions” (*id.* at 4). Therefore, the Examiner concedes, “Rosch does not teach that trunk cover 114 is releasably attached at the front and rear waist regions” (*id.*).

The Examiner cites Christoffel and New to meet the limitations requiring the garment to have a belt and inner absorbent structure which are releasably and refastenably attached to each other and to the outer garment shell (*id.*). Specifically, the Examiner cites Christoffel as disclosing a girl’s swimsuit that has an “absorbent pant/bottom portion 98 [which] is releasably attached to the upper portion/bodice 42 at the front and rear waist areas via hook and loop fasteners 92 to secure the pant portion and upper portion about the waist of the wearer and for greater ease in applying and removing

said swimsuit” (*id.* (citing Christoffel [0071]-[0074])). Based on these teachings the Examiner concludes that an ordinary artisan would have considered it obvious to use hook and loop fasteners to releasably and refastenably attach “outer cover 114 and garment 110 taught by Rosch so as to more easily apply and remove garment 110 as taught by Christoffel” (*id.*).

The Examiner cites New as disclosing an absorbent garment with an absorbent assembly and a waist belt in which “the waist belt is releasabl[y] and refastenably attached to the assembly” (*id.*). The Examiner cites New as teaching that its detachable belt “provides a more contoured fit for a user and thus is less noticeable under clothing” (*id.*).

Therefore, the Examiner concludes, an ordinary artisan would have considered it obvious “to modify the waistbelt taught by Rosch by substituting a detachable belt as taught by New to provide a more comfortable and discreet fit for the user” (*id.*). The Examiner further reasons that combining the teachings of Rosch, Christoffel, and New “would therefore yield an absorbent garment in which the absorbent assembly is releasably and refastenably attached generally at the front and back regions to a waist belt and a garment shell that is releasably and refastenably attached at the front and back waist regions to the waist belt” (*id.*).

Appellants contend that whether Rosch, Christoffel, and New are “considered alone or in combination the references fail to show or suggest an absorbent garment in which an absorbent assembly and a garment shell are each releasably and refastenably attached to a waist belt” (App. Br. 6). Rather, Appellants argue, Rosch discloses that its inner garment is non-refastenably bonded to the waist portion of the outer shell garment (*id.* at 7).

Appellants urge that New fails to suggest modifying the manner in which Rosch's inner absorbent component is bound to the outer garment shell because New does not disclose attaching the belt of its absorbent device to any other garment (*id.* at 8-9). Appellants argue that Christoffel also fails to suggest a releasable/refastenable connection between the inner waist portion of an absorbent assembly and an outer shell because Christoffel only teaches such a connection between the bodice and lower portion of a disposable swimsuit at the suit's front waist portion, and not between the inner and outer portions of the suit (*id.* at 9-10).

In view of the positions advanced by Appellants and the Examiner, the issue on appeal is whether the Examiner erred in concluding that an ordinary artisan would have considered a garment, as recited in claim 1 and applied in claim 36, which has an outer shell, an inner waist portion, and an inner absorbent assembly, each of which are releasably and refastenably attached to each other at the front and rear waist portions of the garment, obvious in view of a disclosure of an active wear trunk having an inner absorbent assembly non-releasably and non-refastenably attached to the waist of the outer shell, a disclosure of a disposable girl's bathing suit that uses releasable and refastenable attachment means to allow release and reattachment of the upper and lower portions of the swimsuit for ease of applying and removing the suit, and a disclosure of an absorbent article that includes a waist belt portion to which the absorbent portion is releasably attached.



*FINDINGS OF FACT (“FF”)*

1. Rosch discloses “a disposable garment that may be adapted to provide containment and absorbency of waste matter while being useful as active and swim wear” (Rosch, col. 1, ll. 8-10).

2. One embodiment of Rosch’s garment is a “trunk” that has an outer shell, or “trunk cover” 114 (Rosch, col. 9, ll. 60-61), and an inner “pant structure” 112 (*id.* at col. 10, ll. 26-27), with a “waste containment structure” 142 (*id.* at col. 13, ll. 20-21) disposed within the inner pant structure 112 (*see* Figures 4 and 5).

3. Regarding the attachment of the outer trunk cover 114 to the waste absorbent-containing inner pant structure 112, Rosch discloses that “[t]he waist elastic members 143 and 145 [of the inner pant structure] may be stretch bonded to the waist regions 131 and 133 of the trunk cover 114 or bonded in a relaxed state to a gathered portion [of] the waist regions 131 and 133 of the trunk cover 114” (Rosch, col. 10, ll. 33-36; *see also* Figure 4).

4. Regarding the attachment of the outer trunk cover 114 to the waste absorbent-containing inner pant structure 112, Rosch also states:

The waist regions 131 and 133 and the waist elastic members 143 and 145 are desirably bonded together by adhesives, however other methods of bonding discussed above can be utilized. The waist regions 131 and 133 of the trunk cover 114 may be attached to the waist elastic members 143 and 145 around the entirety of the waist opening 134 or only a portion thereof.

(Rosch, col. 10, ll. 42-49.)

5. Rosch discloses:

[A] number of modifications and changes may be made without departing from the spirit and scope of the present invention.

For instance, alternative or optional features described as part of one embodiment can be used to yield another embodiment. Additionally, only one rather than both ends of the waste containment structure can be elastically connected to the cover.

(Rosch, col. 16, ll. 59-65.)

6. Christoffel discloses:

A disposable, one-piece swimsuit for girls includes a bodice attached to a chassis. The bodice is designed to provide upper torso coverage while the chassis can include absorbent and containment features. The upper torso coverage contributes to social decency and also protects the wearer's skin against excessive exposure to the sun. The absorbent and containment features can either be integrated within the chassis or can be in the form of a separate, pant-like, absorbent garment covered by the chassis.

(Christoffel, abstract.)

7. Christoffel discloses that its swimsuit “is disposable, such that it can be worn for a limited time, until the garment is soiled or for the duration of the wearer's water activities” (Christoffel [0006]).

8. Christoffel discloses that in one embodiment of its swimsuit “[a] refastenable fastening system 92, such as a hook and loop fastener, can be applied to the front region 44 of the bodice 42 along the waist region 24 and to the front region 28 of the chassis 22 along the waist region 24, such that the bodice 42 and the chassis 22 can be releasably engaged to one another” (Christoffel [0071]; *see also* Figures 18 and 19).

9. Christoffel discloses another embodiment of its swimsuit in which “the chassis 22 is a pant-like absorbent product 98 and is attached to the bodice 42” (Christoffel [0072]; *see also* Figures 21 and 22). Regarding this embodiment, Christoffel discloses that “either elastic bands or strings or

other forms of refastenable fastening systems 92 can be used at the sides of, or around the back of, the wearer's mid-torso region to secure the bodice 42 about the wearer's mid-torso" (*id.*).

10. Christoffel discloses:

In each of the embodiments of the invention, a refastenable fastening system 92 can be included for greater ease in applying and removing the swimsuit 20. For example, the front strap portion 68 can be releasably attached to the back strap portion 70 using a refastenable fastening system 92, such as a hook and loop fastener, as shown in FIG. 21.

(Christoffel [0073].)

11. Christoffel discloses:

[I]n each of the embodiments of the invention, bonding between the bodice 42 and the chassis 22, and/or between front and back regions 44, 46, 28, 30 of the bodice 42 and chassis 22, can be accomplished using attachment means known to those skilled in the art such as adhesive, thermal or ultrasonic bonding.

(Christoffel [0074].)

12. New discloses:

A detachable two piece absorbent garment 10 [is] suitable for use as, but not limited to, an incontinence aid. The garment 10 features a belt 12 and a disposable assembly 14. The belt 12 may be made of receiving material bounded by two laterally extending edges 16. The receiving material is suitable for refastenably attaching desired portions of the belt 12 to complementary hook style mechanical fasteners.

(New, col. 3, ll. 29-37; *see also* Figure 1.)

13. New discloses that the "belt" is the component of the garment 10 to which both waist margins 32 and 34 of the disposable assembly 14 are

attached which encircles the waist of the wearer, and holds the disposable assembly 14 against the wearer (*id.* at col. 9, ll. 63-67).

14. New discloses that, because of the belt's dimensions and arcuate shape, it "more closely fits the wearer and is less noticeable under the wearer's clothing under static conditions" (*id.* at col. 1, ll. 62-64). The belt also "does not interface with portions of the wearer's body which have relatively large degrees of motion during typical body movement under dynamic conditions [and] . . . enhances comfort while the absorbent garment is worn" (*id.* at col. 1, l. 65 through col. 2, l. 2).

#### *PRINCIPLES OF LAW*

In proceedings before the Patent and Trademark Office, the Examiner bears the burden of establishing a prima facie case of obviousness based upon the prior art. "[The Examiner] can satisfy this burden only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references."

*In re Fritch*, 972 F.2d 1260, 1265 (Fed. Cir. 1992) (citations omitted, bracketed material in original).

Emphasizing a flexible approach to the obviousness question, in *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), the Supreme Court nonetheless similarly noted:

[I]t can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements *in the way the claimed new invention does* . . . because inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known.

*Id.* at 418-419 (emphasis added); *see also id.* at 418 (requiring a determination of “whether there was an apparent reason to combine the known elements *in the fashion claimed* by the patent at issue”) (emphasis added).

Ultimately, therefore, “[i]n determining whether obviousness is established by combining the teachings of the prior art, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.” *In re GPAC Inc.*, 57 F.3d 1573, 1581 (Fed. Cir. 1995) (internal quotations omitted).

#### ANALYSIS

We agree with Appellants that the Examiner has not made a *prima facie* case that claims 1 and 36 would have been obvious to one of ordinary skill in the art. Claim 1 requires the garment’s inner absorbent assembly to be “releasably and refastenably attached generally at the front and back waist regions thereof to the waist belt,” and the garment shell to be “releasably and refastenably attached generally at the front and back waist regions of said garment shell to the waist belt.” Similarly, claim 36 requires the garment to be applied to the user by “releasably and refastenably attaching an absorbent assembly to said waist belt . . . and releasably and refastenably attaching a garment shell to the waist belt.”

We acknowledge Rosch’s disclosure that the inner waste-absorbing component of its disposable garment can be attached at only the front or rear of the cover (FF 5), and that the inner portion of the garment can be attached at a portion of, rather than the entire waistband (FF 4). However, we do not agree with the Examiner that these disclosures would have taught an ordinary artisan that “one end of the absorbent assembly is releasably and

refastenably connected, as the only alternative to a non-refastenably connected end is a refastenably connected end (which is inherently and necessarily also releasably connected), since both ends must be somehow connected to the cover as taught by Rosch” (Ans. 8).

In direct contradistinction to claims 1 and 36 and the Examiner’s arguments, Rosch teaches that the inner waste absorbent-containing portion of its garment should be attached to the outer cover using non-releasable and non-refastenable attachments (FF 3). Moreover, the Examiner has not adequately explained why Christoffel or New would have prompted an ordinary artisan to modify this aspect of Rosch’s garment.

Christoffel discloses the use of releasable and refastenable attachment means for connecting the upper and lower outer portions of a disposable swimsuit for girls (FF 9). Christoffel also discloses that using such releasable and refastenable attachment means can make the disposable swimsuit easier to apply and remove (FF 10).

However, the Examiner does not point to any disclosure in Christoffel suggesting that using releasable/refastenable components between the inner absorbent component of the swimsuit’s pant portion and its outer shell, as opposed to the suit’s upper and lower portions, would also render the suit easier to apply and remove. We therefore do not agree with the Examiner that Christoffel would have prompted an ordinary artisan to modify Rosch’s direct teaching of using permanent bonding between the inner absorbent component and outer garment shell, and instead use the releasable/refastenable components recited in claims 1 and 36.

We note New’s disclosure that its belt can be releasably and refastenably attached to the absorbent component of its device (FF 12, 13),

and that a belt having the disclosed dimension is less obtrusive or more comfortable when worn under clothing (FF 14). However, the Examiner does not point to, and we do not see, any disclosure in New suggesting that the belt should be attached to a garment worn outside the belt/absorbent article assembly. We therefore do not agree with the Examiner that an ordinary artisan would have been prompted to attach New's belt to an outer garment using releasable/refastenable components.

In sum, for the reasons discussed, we agree with Appellants that the Examiner has not made a prima facie case that one of ordinary skill in the art would have considered the product recited in claim 1, or the process recited in claim 36, obvious in view of Rosch, Christoffel, and New. We are therefore compelled to reverse the Examiner's obviousness rejections of claims 1 and 36, and their dependent claims.

REVERSED

dm

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